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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 722

LILLIAN H. WILLIS,
Petitioner,

against

CONSOLIDATED TEXTILE CO., INC. and MANUFACTURERS TRUST COMPANY,
Respondents.

In the Matter
of
CONSOLIDATED TEXTILE CORPORATION,
Debtor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

EMANUEL REDFIELD,
Attorney for Petitioner,
60 Wall Street,
New York, New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, LILLIAN H. WILLIS, respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit, which in a *per curiam* opinion affirmed the order of the District Court for the Southern District of New York denying, not in its discretion, but as a matter of law, petitioner's motion for an order reopening the proceedings under Section 77 (b) of the Bankruptcy Act of the reorganization of the above named debtor so as to permit the petitioner to exchange bonds of the debtor for the

securities of the successor corporation two months after the expiration of the bar date fixed in the final decree in the reorganization proceedings.

A certified transcript of the record in the case, including the proceedings in said Court of Appeals, is furnished herewith in accordance with the rules of this Court.

STATEMENT

The petitioner is the holder and owner of three first mortgage bonds of the debtor having a total face value of $3,000. She acquired them in 1933 upon the death of her father who had bought them in 1928. Since 1933 the bonds lay in a safe deposit box owned jointly with her sister. During that time, they were forgotten and believed worthless by petitioner, except once in 1944 when she made inquiry about their value. At that time she was informed by a bank official that they were worthless. Upon the death of petitioner's sister in September 1948, the safe deposit box was opened at which time the bonds were again noticed by petitioner. She again made inquiry and tendered them in September 1948 to the successor corporation of the debtor in reorganization (ff. 9-12).

She was told by the respondent company that she was two (2) months late in presenting the bonds for exchange, and that all property represented by them was forfeited (ff. 9-12).

Since these bonds were bearer bonds, the petitioner did not receive any notice. Nor did she read of any notice or even know about the reorganization (f. 13).

The petitioner is a woman of forty-five years of age, without any business experience or training. She spent all her life taking care of the sick members of her family, and is now obliged to seek employment (f. 14).

By the terms of the plan of reorganization, one old bond could be exchanged for a bond of the successor company in the face amount of $500.00 and one hundred (100) shares of its capital stock. Thus, the petitioner would be entitled to bonds totaling $1,500.00 in face value and two hundred (200) shares of capital stock (f. 15). The estimated monetary value of petitioner's interest is about $6,000.

By order of the Bankruptcy Court on July 19, 1943, the Court fixed July 19, 1948 as the last date for the surrender of the debtor's securities by holders of them (ff. 64, 71).

The petitioner thereupon promptly on March 14, 1949, applied to the District Court for relief and appealed to the discretion of the Court to permit the exchange. The Court held that it had no power to grant the relief, upon the authority of *Duebler v. Sherneth Corporation,* 160 Fed. (2nd) 472 (C. A. 2) (f. 200). The petitioner appealed to the Court of Appeals with an argument to show that the new rules since the *Duebler* case furnish the authority for the exercise of the power to relieve petitioner. That Court on January 11, 1950, nevertheless, affirmed with a *per curiam* opinion on the authority of the *Duebler* case (page 70 record).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below, a Federal Court, should be reviewed, because it has decided a federal question of substance, not heretofore determined by this Court. This Court has never passed upon the serious and recurrent question in the administration of reorganization proceedings under 77 (b) of the Bankruptcy Act whether a District Court has power to reopen the proceedings for the sole purpose of enabling a security holder to exchange his securities for those of the successor company.

The contentions of petitioner that power resides in the District Court to exercise discretion is set forth in the annexed brief.

2. This Court has never passed upon the question whether under the circumstances stated a bondholder may not have the relief of a District Court in the exercise of its discretion or equitable powers. Although the Second Circuit and the Third Circuit Appellate Courts have held that even if the exercise of discretion is warranted, no power exists, nevertheless, this Court has not been called upon to give its final pronouncement on that doctrine.

3. This Court should review the decision below because of the unusual hardship created by the construction placed upon the statutes by the Courts below.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court for its review a full and complete transcript of the record and of all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court below be reversed, and that the petitioner be granted such other and further relief as may seem proper.

Dated: New York, February 2, 1950.

LILLIAN H. WILLIS,
Petitioner.

By EMANUEL REDFIELD,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Court of Appeals is not yet reported. It appears at page 70 of the record.

JURISDICTION

The jurisdiction of this Court is invoked under Sections 24(c) and 121 of the Bankruptcy Act and under Section 1254 sub. 1 of the Judicial Code. The date of the judgment of the Court below to be reviewed is January 11, 1950.

STATEMENT OF THE CASE

A statement of the case appears in the foregoing petition for the writ, and for the sake of brevity is here omitted.

ARGUMENT

POINT I.

Section 60 (b) federal rules of procedure and Section 2 subdivision a (8) empower the Court to exercise its discretion to reopen estates to enable security holders to exchange securities after the bar date of a closing order.

A preliminary observation of the facts of this case presents the problem whether the construction of the bankruptcy laws operate to create a forfeiture of the property of a bondholder in favor of the successor corporation of the debtor. In our society when a windfall is created by reason of abandonment of property, the windfall usually escheats to the people—to the public. Even in those cases

it is frequently provided that the money is deposited in the public treasury for a substantial term of years, ten or twenty, to await the claim of those who slept on their rights. Such instances are found in probate practice where heirs cannot be found, abandoned dormant bank accounts, insurance receipts, etc. The result that has followed from the decision of the bankruptcy court is that a debtor corporation who just had been rescued by the grace of our bankruptcy laws from a load of debt is now created the beneficiary of a windfall because the bondholder presented her securities two (2) months after the date mentioned in the bankruptcy order closing the estate.

The question is whether Sections 204 and 205 of the Bankruptcy Act are an absolute bar to the presentation of securities by a holder regardless of what excuse exists or what equities are in her favor, and whether Section 60 (b) of the Federal Rules of Procedure and Section 2 sub. (a)8 of the Bankruptcy Act apply.

Sections 204 and 205 of the Bankruptcy Act read as follows:

> "Sec. 204. Upon distribution, as provided in section 224 of this Act, the judge may, upon notice to all persons affected, fix a time, to expire not sooner than five years after the final decree closing the estate, within which, as provided in the plan or final decree—
>
> (1) the creditors, other than holders of securities, shall file, assign, transfer, or release their claims; and
>
> (2) the holders of securities shall present or surrender their securities. After such time no such claim or stock shall participate in the distribution under the plan.
>
> "Sec. 205. The securities or cash remaining unclaimed at the expiration of the time fixed as provided in section 204 of this Act, or of any extension thereof, shall become the property of the debtor or of the new

corporation acquiring the assets of the debtor under the plan, as the case may be, free and clear of any and all claims and interests."

Section 2, subdivision (a) 8, Bankruptcy Act, reads as follows: "The Courts of the United States hereinbefore defined as Courts of bankruptcy * * * are hereby invested * * * with such jurisdiction * * * *and to reopen estates for cause shown.*" (italics supplied)

Section 119 of the Bankruptcy Act provides that whenever the Court is required or permitted to fix a time for any purpose, the Court may extend such time.

Section 60 (b) provides:

"On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, USC, Title 28, Section 118, or to set aside a judgment for fraud upon the

Court. Writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

Yet in *Tuffy v. Nichols,* 120 Fed. (2nd) 906, cert. denied 314 U. S., it was held that where unadministered assets are discovered a reopening of the estate was allowed two (2) years after the estate was closed. Those who argue that to reopen an estate is to upset administration are therefore met with this case which had no qualms about reopening when money came into the estate. There is an inconsistency if not an ironic injustice with a smirk in refusing a reopening when readjustment is sought in favor of a security holder, merely because it would upset things.

In *Grand Union Equipment Co. v. Lippner,* 167 F. (2nd) 958 (2nd C. C. A.), the question presented squarely whether Section 60-B was applicable to the bankruptcy proceedings. The Court said it was but only as to final orders (The order in the instant case is final). Said the Court at page 961:

"And the situation as to final orders is pretty thoroughly covered by the power granted, without qualification, to 'reopen estates for cause shown.' Sec. 2, sub. a(8), of the Bankruptcy Act, II U. S. C. A. section 11, sub. a(8). This power is exercised in the discretion of the Court for cause shown unless rights of third persons have intervened which would render such a course inequitable. *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* 300 U. S. 131, 137, 57 S. Ct. 382, 81 L. Ed. 557; *Curtis v. O'Leary,* 8 Cir., 131 F. 2d 240, 245; *Standard Steel Works v. American Pipe & Steel Corp.,* 9 Cir., 111 F. 2d 1000; *Mohawk Realty Corp. v. Wise Shoe Stores, supra;* cf. *Duebler v. Sherneth Corp.,* 2 Cir., 160 F. 2d 472. The expiration of an extended period of time will not prevent a reopening for justifiable reasons. *Tuffy v. Nichols,* 2 Cir., 120 F. 2d 906, certiorari denied *Nichols v. Tuffy,* 314 U. S.

660, 62 S. Ct. 113, 86 L. Ed. 528; *Gerber v. Fruchter,* 2 Cir., 147 F. 2d 120; *Traub v. Marshall Field & Co.,* 5 Cir., 182 F. 622; *Milando v. Perrone, supra,* 2 Cir., 157 F. 2d 1002, 1003. Hence control of a bankruptcy court over its orders has been upheld generally without reference to this rule. See *Pfister v. Northern Illinois Finance Corp.,* 317 U. S. 144, 63 S. Ct. 133, 87 L. Ed. 146; *Bowman v. Loperena,* 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177; *Wayne United Gas Co. v. Owens-Illinois Glass Co., supra; In re Barnett,* 2 Cir., 124 F. 2d 1005, 1012, and cases cited by Moore and Oglebay, *supra.* These authorities are controlling here and we need not consider the possible applicability of the rule in other cases, such as those dealing with orders affecting third parties, or perhaps denying discharge. Cf. *Perlman v. 332 West Seventy-Second Street Co.,* 2 Cir., 127 F. 2d 716, 718, 719; *In re Loweree,* 2 Cir., 157 F. 2d 831, 834."

In *Duebler v. Sherneth Corp.,* (a prior case) 160 Fed. (2nd) 472, the same Court in a case similar to the one at bar held that Section 60-b was not applicable because its six months' time limit had been exceeded and also because Sections 204 and 205 provide an absolute statute of limitation for the presentation of securities, admitting of no exception.

As to the observation about the application of Section 60-b it should be noted that since the *Duebler* case was decided, Section 60-b was amended so as to provide by subdivision 6 that the Court may relieve a party for "any other reason justifying relief from the operation of the judgment."

This Court recently had occasion to apply it in the case of *Klapprott v. United States,* 93 Law Edition (Advance Sheet 6) 279. In that case the Court held that even after four years from the time of the entry of judgment denaturalization could be relieved from the judgment de-

naturalizing him. Under the facts there the District Court and the Circuit Court held that he was guilty of inexcusable neglect and therefore came within the time limitation provided for such cases in Section 60 (b). But this Court held (page 287) among other things, that subdivision 6 also applied and that petitioner's actions could not be merely neglect.

The same force must be applied to this case. Here the appellant cannot be charged with neglect. She had no knowledge of these proceedings or knowledge of the change in her securities. As Judge Bright put it in the *Duebler* case, "Applicants were, so far as the record shows, oblivious of the change in their securities." To be oblivious is quite different from being neglectful. To charge one with neglect or inadvertence we measure him with the yardstick of what a reasonable person would do under the circumstances, taking into consideration the modes, and the locale of the conduct.

Could the petitioner, a simple woman devoted to tending the sick members of her family who was told that her securities were worthless by a bank officer, be expected to follow up a corporate reorganization of which she had no knowledge because the bonds were bearer bonds? This is especially true when she had these bonds in a box for fifteen (15) years with the thought that they were worthless, as so many others during the depression period. Could we expect her to be diligent? Couldn't we rather expect her to let the bonds rest, forgotten by events? Is this negligence or obliviousness?

As Justice Black pointed out in the *Klapprott* case (page 288) the petitioner was sick, he was preoccupied with other matters, and without means to hire a lawyer. This was not neglect.

The facts in this proceeding are stronger than the *Klapprott* case because *Klapprott* at least was personally served with process. He had good reason to know of the action against that followed with the judgment against him. Mrs. Willis was utterly unaware of this proceeding. She held bearer bonds. She did not know about the proceeding, nor did she receive notice of it.

Therefore, her claim of obliviousness is stronger than *Klapprott*. Nevertheless *Klapprott* got relief.

See also to the effect that Section 60 (b) is applicable to proceedings to reopen a closed corporate reorganization:

Re: Lowerre, 157 Fed. (2) 831;
Perlman v. 322 West 72 St., 127 Fed. (2) 716.

General Order 37 provides that the Federal Rules of Practice shall be followed in bankruptcy, except where inconsistent with the Bankruptcy Act. Can it be said that Section 60 (b) is inconsistent with the Act? It is no more inconsistent with it than it would be with any other scheme of procedure culminating in a judgment or order. In all such cases Section 60 (b) would afford relief to the extent that the proceeding would be reopened. To say that a provision of practice enabling judgments to be reopened is inconsistent with the scheme of administration is to deny the wisdom of empowering a court to relieve for mistake, neglect, etc. Courts have come a long way from the day when a mistake or neglect was irreparable. The true statement is that Section 60 (b) is in perfect harmony with Sections 204 and 205 of the Bankruptcy Act. It affords relief when a judge in the exercise of discretion believes it should be exercised.

Even if it were granted that Sections 204 and 205 are a statutory scheme of limit, instances can be cited where

even in ordinary civil actions there are numerous exceptions to the operation of the limitation. The exceptions undoubtedly stem out of a desire to alleviate a hardship. Instances are; infancy, death of claimant, aliens affected by war, and sickness. These instances are to refute a contention that every limitation of time is absolute, without exception in favor of hardship. We urge that 204 and 205 must be read with 119 and Sect. 2 sub. a (8) and Sect. 60-b sub. 6. That Sections 204 and 205 are not absolute bar is indicated by the *Tuffy, Lowerre* and *Perlman* cases.

See also *Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144.

It is submitted, therefore, that the equities of this case favor the appellant and that on the law Section 60 (b) subdivision 6, Rules of Procedure, Sect. 2 sub. a (8) and Sect. 119 apply, and to that extent the *Duebler* case is overcome.

In the following cases the Court also held that relief is discretionary even after the proceedings were ended; *North American Car Corp. v. Peerless,* 143 Fed. (2nd) 938; *Kelby v. Prudence,* 140 Fed. (2nd) 185; *Mohawk Realty Co. v. Wise Shoe Stores,* 111 Fed. (2nd) 287.

POINT II.

There has been no prejudice to the debtor or its successor.

To meet respondents' contention that since July 19, 1948. several thousands of shares have been traded in the stock of the successor company first it should be noticed that the stock had been traded since July 19, 1948. Nothing is said as to how many shares were traded between that date and

September 27, 1948, when demand was made. Assuming, *arguendo,* that all shares alleged were traded during that period, nevertheless, there is no proof that any person buying such shares relied on the financial status of the company as of July 19, 1948. The statement of the respondent is not proof but sheer speculation. As between the petitioner, holder of these bonds who definitely is prejudiced, and a speculative prejudice the balance weighs heavily in her favor. To say that a person trading in the stock of the successor would be prejudiced marketwise by the granting of this application is to state a proposition contrary to the usual course of the purchase and sale of securities. People buy and sell securities on their market value of supply and demand and not because a few thousand dollars are to be redeemed.

Then again, who is to be favored, the person looking for a windfall by speculation or the person like petitioner whose savings (i. e., that of her father) are invested in these securities?

Were any weight given to respondents' contention in that respect it would mean that an application, such as this, involving a company whose shares are traded, could never be granted. In such cases it could always be asserted without proof that some purchaser of even one share an instant after the closing date would be prejudiced by a granting of the application.

The equities here, however, cannot be overlooked. They outweigh any speculative statements.

CONCLUSION

The petition for a Writ should be granted.

Dated New York, N. Y., March 21, 1950.

Respectfully submitted,

EMANUEL REDFIELD,

.....,

Attorney for Petitioner,
Lillian H. Willis.